

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FILED  
JAN 10 2008  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy

Defendant.

2021 2020 2019 2018 2017 2016 2015 2014 2013 2012 2011 2010 2009 2008 2007 2006 2005 2004 2003 2002 2001 2000 1999 1998 1997 1996 1995 1994 1993 1992 1991 1990 1989 1988 1987 1986 1985 1984 1983 1982 1981 1980 1979 1978 1977 1976 1975 1974 1973 1972 1971 1970 1969 1968 1967 1966 1965 1964 1963 1962 1961 1960 1959 1958 1957 1956 1955 1954 1953 1952 1951 1950 1949 1948 1947 1946 1945 1944 1943 1942 1941 1940 1939 1938 1937 1936 1935 1934 1933 1932 1931 1930 1929 1928 1927 1926 1925 1924 1923 1922 1921 1920 1919 1918 1917 1916 1915 1914 1913 1912 1911 1910 1909 1908 1907 1906 1905 1904 1903 1902 1901 1900 1899 1898 1897 1896 1895 1894 1893 1892 1891 1890 1889 1888 1887 1886 1885 1884 1883 1882 1881 1880 1879 1878 1877 1876 1875 1874 1873 1872 1871 1870 1869 1868 1867 1866 1865 1864 1863 1862 1861 1860 1859 1858 1857 1856 1855 1854 1853 1852 1851 1850 1849 1848 1847 1846 1845 1844 1843 1842 1841 1840 1839 1838 1837 1836 1835 1834 1833 1832 1831 1830 1829 1828 1827 1826 1825 1824 1823 1822 1821 1820 1819 1818 1817 1816 1815 1814 1813 1812 1811 1810 1809 1808 1807 1806 1805 1804 1803 1802 1801 1800 1799 1798 1797 1796 1795 1794 1793 1792 1791 1790 1789 1788 1787 1786 1785 1784 1783 1782 1781 1780 1779 1778 1777 1776 1775 1774 1773 1772 1771 1770 1769 1768 1767 1766 1765 1764 1763 1762 1761 1760 1759 1758 1757 1756 1755 1754 1753 1752 1751 1750 1749 1748 1747 1746 1745 1744 1743 1742 1741 1740 1739 1738 1737 1736 1735 1734 1733 1732 1731 1730 1729 1728 1727 1726 1725 1724 1723 1722 1721 1720 1719 1718 1717 1716 1715 1714 1713 1712 1711 1710 1709 1708 1707 1706 1705 1704 1703 1702 1701 1700 1699 1698 1697 1696 1695 1694 1693 1692 1691 1690 1689 1688 1687 1686 1685 1684 1683 1682 1681 1680 1679 1678 1677 1676 1675 1674 1673 1672 1671 1670 1669 1668 1667 1666 1665 1664 1663 1662 1661 1660 1659 1658 1657 1656 1655 1654 1653 1652 1651 1650 1649 1648 1647 1646 1645 1644 1643 1642 1641 1640 1639 1638 1637 1636 1635 1634 1633 1632 1631 1630 1629 1628 1627 1626 1625 1624 1623 1622 1621 1620 1619 1618 1617 1616 1615 1614 1613 1612 1611 1610 1609 1608 1607 1606 1605 1604 1603 1602 1601 1600 1599 1598 1597 1596 1595 1594 1593 1592 1591 1590 1589 1588 1587 1586 1585 1584 1583 1582 1581 1580 1579 1578 1577 1576 1575 1574 1573 1572 1571 1570 1569 1568 1567 1566 1565 1564 1563 1562 1561 1560 1559 1558 1557 1556 1555 1554 1553 1552 1551 1550 1549 1548 1547 1546 1545 1544 1543 1542 1541 1540 1539 1538 1537 1536 1535 1534 1533 1532 1531 1530 1529 1528 1527 1526 1525 1524 1523 1522 1521 1520 1519 1518 1517 1516 1515 1514 1513 1512 1511 1510 1509 1508 1507 1506 1505 1504 1503 1502 1501 1500 1499 1498 1497 1496 1495 1494 1493 1492 1491 1490 1489 1488 1487 1486 1485 1484 1483 1482 1481 1480 1479 1478 1477 1476 1475 1474 1473 1472 1471 1470 1469 1468 1467 1466 1465 1464 1463 1462 1461 1460 1459 1458 1457 1456 1455 1454 1453 1452 1451 1450 1449 1448 1447 1446 1445 1444 1443 1442 1441 1440 1439 1438 1437 1436 1435 1434 1433 1432 1431 1430 1429 1428 1427 1426 1425 1424 1423 1422 1421 1420 1419 1418 1417 1416 1415 1414 1413 1412 1411 1410 1409 1408 1407 1406 1405 1404 1403 1402 1401 1400 1399 1398 1397 1396 1395 1394 1393 1392 1391 1390 1389 1388 1387 1386 1385 1384 1383 1382 1381 1380 1379 1378 1377 1376 1375 1374 1373 1372 1371 1370 1369 1368 1367 1366 1365 1364 1363 1362 1361 1360 1359 1358 1357 1356 1355 1354 1353 1352 1351 1350 1349 1348 1347 1346 1345 1344 1343 1342 1341 1340 1339 1338 1337 1336 1335 1334 1333 1332 1331 1330 1329 1328 1327 1326 1325 1324 1323 1322 1321 1320 1319 1318 1317 1316 1315 1314 1313 1312 1311 1310 1309 1308 1307 1306 1305 1304 1303 1302 1301 1300 1299 1298 1297 1296 1295 1294 1293 1292 1291 1290 1289 1288 1287 1286 1285 1284 1283 1282 1281 1280 1279 1278 1277 1276 1275 1274 1273 1272 1271 1270 1269 1268 1267 1266 1265 1264 1263 1262 1261 1260 1259 1258 1257 1256 1255 1254 1253 1252 1251 1250 1249 1248 1247 1246 1245 1244 1243 1242 1241 1240 1239 1238 1237 1236 1235 1234 1233 1232 1231 1230 1229 1228 1227 1226 1225 1224 1223 1222 1221 1220 1219 1218 1217 1216 1215 1214 1213 1212 1211 1210 1209 1208 1207 1206 1205 1204 1

NO. 4:07-CV-548-A

Plaintiff filed its first amended complaint on November 21, 2007. Plaintiff alleges that defendant, its insurance provider, breached the insurance contract in denying a claim plaintiff made thereunder, and that, in connection with its denial of the claim,

defendant engaged in unfair settlement practices in violation of section 541.060 of the Texas Insurance Code.

II.

The Motion for Summary Judgment

Defendant seeks a summary adjudication that the insurance policy's water exclusion precludes coverage, and that it did not act in bad faith in denying plaintiff's claim.

III.

Facts

The record establishes the following facts without dispute:

Plaintiff is a law firm. On January 22, 2007, defendant issued plaintiff Policy No. IL-PACP-3225C776-TLC-07 (the "Policy"). The Policy included Businessowners Property Coverage, which covered a building at 2912 West 6th Street, Fort Worth, Texas (the "Premises") where plaintiff's law firm is located.

On or about July 9, 2007, plaintiff notified defendant that it had sustained water damage to the basement of the Premises. Defendant assigned the claim to Cliff Dalton ("Dalton"), a claims representative. Dalton contacted plaintiff in regards to the claim, and spoke with Anna Claunch ("A. Claunch"), plaintiff's office manager. A. Claunch told Dalton that she did not know where the water in the basement was coming from, but that it had been raining a lot. Several inches of rain had fallen on the

Premises in the three to four weeks preceding plaintiff's discovery of the basement flooding.

On July 10, 2007, Dalton inspected the Premises. An exterior door at the bottom of a staircase provides access to the basement of the Premises. A floor drain is located at the bottom of the staircase in the area immediately outside the basement door. Dalton noted that water was pooled around this drain, and based on his inspection, he believed that the water was entering the basement under the exterior door. On July 11, 2007, Dalton notified plaintiff that he did not believe that the loss to the basement was covered under the Policy because it had been caused by surface water or flooding.

Plaintiff hired Blackman Mooring Company ("Blackman Mooring") on July 12, 2007, to pump the water out of the basement. Blackman Mooring pumped the standing water out of the basement, and attempted to pump the water from the drain outside the basement's exterior door. After two to three hours of pumping, Blackman Mooring stated that there seemed to be no end to the water, and they were unable to determine the source of the water. Blackman Mooring suggested that plaintiff call a plumber.

Plaintiff did so, and on July 13, 2007, Brian McCall ("McCall"), a plumber with Roto Rooter, inspected the basement.

McCall located the sump<sup>1</sup> and determined that the sump pump, which was supposed to pump water out of the sump, was not working. McCall replaced the broken sump pump, which remedied the problem. McCall subsequently opined that:

[T]here were two possible sources for the water [in the basement], either it was overflowing from the sump pit inside the basement, or it was coming in under the exterior door because the water was pooling there and had no place to drain. It is likely that the water in the basement was from some combination of these sources.

Def.'s App. at 85.

Based on McCall's action, plaintiff took the position that the broken sump pump, rather than the exterior drain outside of the basement door, was the cause of the basement flooding. Dalton maintained his position that "the water pumped out of the basement was rain water that did not drain properly due to stoppage of the storm drain," Def.'s App. at 81, formally declining coverage on behalf of defendant by letter dated July 20, 2007. This action ensued.

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<sup>1</sup>McCall explains that:

The sump is about [four] feet deep and about [twenty] inches in diameter. The sump is shaped like a barrel that fits down into the ground. The top of the sump is level with the surface of the basement. The purpose of the sump is to collect subterranean water beneath the building and then the sump pump takes the water into the plumbing system. . . . The sump pump is inside the sump."

Pl.'s App. at tab 3, p. 2.

#### IV.

##### Pertinent Provisions of the Policy

The parts of the description of the insurance coverage provided by the Businessowners Property Coverage that are pertinent to the contentions of plaintiff are as follows:

##### A. COVERAGE

We will pay for direct physical loss of or damages to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss.

##### 1. Covered Property

Covered Property, as used in this Coverage Form, means the type of property described in this Paragraph A.1., and limited in Paragraph A.2., Property Not Covered, if a Limit of Insurance is shown in the Declarations for that type of property.

- a. Building, meaning in the building or structure described in the Declarations, including:

. . . . .

- (5) Permanently attached:

- (a) Machinery; and

- (b) Equipment; . . . . .

Def.'s App. at 15. An extension of the coverage upon which plaintiff relies is found in paragraph 7.i. in the Coverage section of the Policy, reading, in pertinent part, as follows:

##### 7. Coverage Extensions

Unless otherwise stated, payments made under the following Coverage Extensions are subject to and

not in addition to the applicable Limits of Insurance.

. . . . .

i. Equipment Breakdown

- (1) When a Limit of Insurance is shown in the Declarations for Building or Business Personal Property at the described premises, you may extend that insurance to apply to direct physical loss of or damage to Covered Property at the described premises caused by or resulting from a "breakdown" to "covered equipment".

. . . . .

- (6) The following exclusions in Paragraph B. Exclusions do not apply to this Coverage Extension:

- (a) Paragraph 2.a.;
- (b) Paragraph 2.d.(6); and
- (c) Paragraph 2.e.

Def.'s App. at 31-32.

Pertinent exclusions in the "Paragraph B Exclusions" are as follows:

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

. . . . .

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

. . . . .

- (3) Water or sewage that backs up or overflows from a sewer, drain or sump; or
- (4) Water under the ground surface pressing on, or flowing or seeping through:
  - (a) Foundations, walls, floors or paved surfaces;
  - (b) Basements, whether paved or not; or
  - (c) Doors, windows or other openings;

all whether naturally occurring or due to man made or other artificial causes.

Def.'s App. at 36-37.

V.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material

fact. Anderson, 477 U.S. at 256. The movant may discharge this burden by pointing out the absence of evidence to support one or more essential elements of the nonmoving party's claim "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 256. To meet this burden, the nonmovant must "identify specific evidence in the record[] and [] articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994). An issue is material only if its resolution could affect the outcome of the action. Anderson, 477 U.S. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v. Lyons, 746 F.2d 265, 269 (5th Cir. 1984).

## VI.

### Analysis

#### A. Contractual Claim

"Texas courts interpret insurance policies using the rules of interpretation and construction generally applicable to other contracts." Performance Autoplex II Ltd. v. Mid-Continent Cas.



Co., 322 F.3d 847, 853-854 (5th Cir. 2003) (citing Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995)). The court's primary concern in construing an insurance policy is to ascertain the true intent of the parties as expressed in the instrument. CBI Indus., Inc., 907 S.W.2d at 520. If an insurance policy is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Id. "Mere disagreement over the interpretation of a provision does not make the provision ambiguous or create a question of fact." Performance Autoplex II Ltd., 322 F.3d at 854. Defendant, the insurer, bears the burden of establishing that a coverage exclusion applies. See Tex. Ins. Code Ann. § 554.002 (Vernon Supp. 2007).

The record before the court establishes without dispute that the water in plaintiff's basement overflowed from the sump, came in under the exterior basement door, or both.<sup>2</sup> Plaintiff contends that all of the water came from overflow of the sump, resulting from a malfunction of the sump pump, which has as its role pumping the water out of the sump into the city sewage system. There is a suggestion by the summary judgment record

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<sup>2</sup>The court recognizes that the source of the water in the basement is a genuine issue of fact. However, this fact issue is not material because its resolution does not affect the outcome of this action. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). As discussed below, the court concludes that the Policy's water exclusion precludes coverage regardless of any source of the water's entry into the basement that is supported by the record currently before the court.

that some of the water that entered into the sump causing it to overflow could be characterized as subterranean water. Defendant argues that, regardless of the possibilities suggested by the summary judgment record as to how the water got into the basement, the water exclusion precludes coverage. The court agrees.

In paragraph B.1.g., the Policy explicitly excludes loss or damage caused directly or indirectly by "surface water" or "[w]ater . . . that backs up or overflows from a . . . sump . . ." or "[w]ater under the ground surface pressing on, or flowing or seeping through . . . [b]asements, whether paved or not; or . . . [d]oors, windows or other openings . . . ." Def.'s App. at 37. Thus, under the plain terms of the Policy, the loss or damage is excluded if it came from any of the sources suggested by the record.<sup>3</sup>

Plaintiff's position is that the loss or damage is covered under the Policy because, the "exclusive cause of the loss [was] the broken sump pump, which [was] not excluded under the Policy . . . ." Pl.'s Br. at 9. Plaintiff reasons that the sump pump

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<sup>3</sup>Plaintiff seems to argue that the loss or damage is covered because: "The words 'sump pump' or the word 'pump' do not appear in the exclusion. The sump pump is not an excluded piece of equipment under the Policy." Pl.'s Br. at 8. The plain language of the water exclusion makes clear that loss or damage caused directly or indirectly by water backing up or overflowing from the sump, whether naturally occurring or due to man made or other artificial causes, is excluded. The mere fact that plaintiff disagrees with this interpretation does not create an issue that can prevent grant of summary judgment. Performance Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 854 (5th Cir. 2003).

was permanently attached machinery or equipment, as contemplated by paragraph A.1.a.(5) of the Policy, and, therefore, the loss or damage is covered under the coverage extension for equipment breakdown in paragraph A.7.i.(1). The court disagrees.

Paragraph A.7.i.(6) states that only three subparagraphs of Paragraph B Exclusions do not apply to the coverage extension for equipment breakdown: (1) paragraph B.2.a., which relates to damage caused by electrical current (Def.'s App. at 38); (2) paragraph B.2.d.(6), which relates to mechanical breakdown (id. at 39); and (3) paragraph B.2.e., which relates to steam boilers, pipes, engines, turbines, and the like (id.). All other parts of the Paragraph B Exclusions apply, so the coverage extension for equipment breakdown is subject to the water exclusions in paragraph B.1.g. Thus, even if plaintiff is correct that the exclusive cause of the loss was the broken sump pump, paragraph B.1.g.(3) expressly prevents coverage for loss or damage caused by water backing up or overflowing from the sump.<sup>4</sup>

Plaintiff has failed to educe an ambiguity in the Policy or otherwise raise a genuine issue of material fact as to whether the water damage exclusions relied upon by defendant apply.

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<sup>4</sup>The Policy's "anti-concurrent cause" provision further supports this conclusion, providing that "loss or damage [described in paragraph B. EXCLUSIONS] is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Def.'s App. at 36.

Defendant has carried its burden to show as a matter of law that they do apply.

B. Extra-Contractual Claims

Plaintiff alleges that defendant has engaged in unfair settlement practices in violation of section 541.060 of the Texas Insurance Code. "Texas courts have clearly ruled that these extra-contractual tort claims require the same predicate for recovery as bad faith causes of action in Texas." Higginbotham v. State Farm Mut. Auto. Ins. Co., 103 F.3d 456, 460 (5th Cir. 1997). Thus, "an insurer will not be faced with a tort suit for challenging a claim of coverage if there was any reasonable basis for denial of that coverage." Id. It follows, a fortiori, that "there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 341 (Tex. 1995). As discussed above, defendant properly denied plaintiff's claim because it was excluded under the Policy. Therefore, plaintiff's extra-contractual claims necessarily fail. See id.

VII.

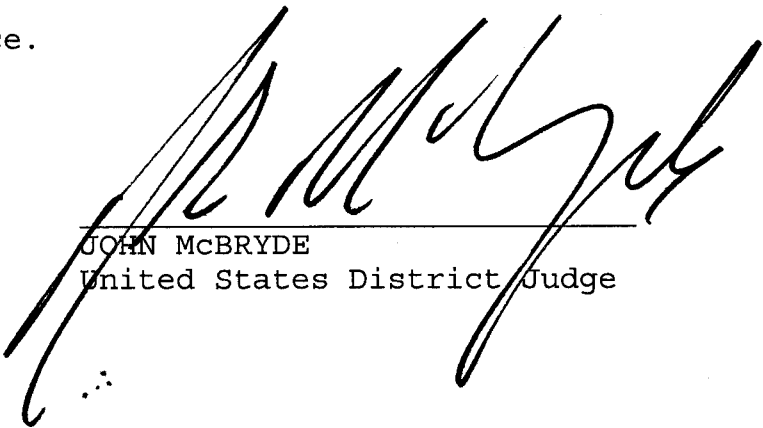
Order

For the reasons discussed above,

The court ORDERS that all claims and causes of action asserted by plaintiff in the above-captioned action be, and are

hereby, dismissed with prejudice.

SIGNED January 10, 2008.



JOHN MCBRYDE  
United States District Judge